IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 292

MISSOURI PACIFIC RAILROAD COMPANY, *Petitioner*,

v.

ELMORE & STAHL, *Respondent*.

On Writ of Certiorari to the Supreme Court of Texas

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the Supreme Court of Texas (R. 237) is reported at 368 S.W. 2d 99. The opinion of the Texas Court of Civil Appeals (R. 227) is reported at 360 S.W. 2d 839.

JURISDICTION

The judgment of the Supreme Court of Texas was entered on May 15, 1963 (R. 244). A timely motion for rehearing was overruled on June 12, 1963 (R. 246). The petition for certiorari was filed on July 19, 1963, and certiorari was granted on October 14, 1963 (R. 246). The jurisdiction of this Court is conferred by 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. In the case of a shipper's claim for spoilage or decay of perishable commodities transported by a common carrier in interstate commerce pursuant to a Uniform Straight Bill of Lading and subject to the provisions of the Perishable Protective Tariff, does a jury finding that all services covered by the Bill were performed by the carrier without negligence and in full compliance with the shipper's instructions, and were performed in a prudent manner as to matters not covered by the Bill or the shipper's instructions, constitute a complete defense for the carrier?

2. In such a case of a claim for spoilage or decay of perishable commodities, once it is found that the common carrier has performed all services with due care and in compliance with the shipper's instructions, is the carrier entitled as a matter of law to the exemption from liability for damage occasioned by the inherent nature or vice of the goods, as provided under the federal common law and under the Uniform Bill?

STATUTE INVOLVED

The pertinent Act of Congress is the so-called Carmack Amendment of June 29, 1906, 34 Stat. 595, c. 3591, § 7, as amended, 49 U.S.C. § 20(11) (1958) (now constituting § 20(11) of the Interstate Commerce Act). The statute reads in relevant part:

> "Any common carrier . . . receiving property for transportation from a point in one State . . . to a point in another State . . . shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier . . . to which such property may

be delivered or over whose line or lines such property may pass . . ."

Rules 130 and 135 of Perishable Protective Tariff No. 17 are set forth in the Appendix, *infra*, p. 25.

STATEMENT

Respondent Elmore & Stahl, fruit shippers, instituted suit in a Texas state court against petitioner, a common carrier, to recover damages for deterioration of an interstate shipment of perishable honeydew melons (R. 1, 6).[1] Petitioner transported for respondent 640 crates of melons from Rio Grande City, Texas, to Chicago in a refrigerator car under a Uniform Straight Bill of Lading.[2] The Bill provides, in pertinent part, that the carrier "shall be liable as at common law" for any loss or damage to the goods (Section 1(a), R. 158). The Bill further provides that "Except in case of negligence of the carrier . . . (and the burden to prove freedom from such negligence shall be on the carrier . . .) the carrier . . . shall not be liable for loss . . . resulting from a defect or vice in the property . . ." (Section 1(b), R. 158.)

[1] The complaint (R. 6) contained four independent counts, each stating a separate claim for damage to a different shipment of perishables. As the Texas Court of Civil Appeals stated, "[E]ach of these counts, in effect, is a separate lawsuit" (R. 228). The shipment involved here is solely that covered by Count 1, which related to the movement of Car ART 35042 from Rio Grande City to Chicago (R. 6, 238). The trial court's judgment for plaintiff on Count 1 was affirmed by the Court of Civil Appeals and subsequently by the Texas Supreme Court (R. 235, 245). A judgment for plaintiff on the different shipments involved in the other three counts was reversed by the Court of Civil Appeals, and no review was had in the Texas Supreme Court (*Ibid.*).

[2] The Bill of Lading is reproduced in the record at R. 157 et seq.

Pursuant to respondent's request, petitioner undertook to furnish certain protective services for the melons in transit, namely "standard refrigeration to destination."[3] The carrier's responsibility with respect to these services is governed by Rules 130 and 135 of Perishable Protective Tariff No. 17 (set out in the Appendix, p. 25, *infra*). The tariff—incorporated by reference in the Bill of Lading—states that "carriers furnishing protective service as provided herein do not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, but merely to retard such deterioration or decay insofar as may be accomplished by reasonable protective service, of the kind and extent requested by the shipper, performed without negligence."

Some of the melons deteriorated in transit;[4] it was undisputed that this deterioration was the result of spoilage and decay. There was no evidence of any specific act of negligence by the carrier.[5] In response to special issues submitted to them at trial, the jury affirmatively found that "defendant, and its connecting carriers, performed without negligence the trans-

[3] An expert witness at the trial explained that "'standard refrigeration to destination' . . . means that the car will be reiced to capacity at all regular icing stations" (R. 90).

[4] The melons were inspected at destination by the Department of Agriculture. The "Inspection Certificate" (Pl. Ex. 5, R. 173) stated that the damage "average[d] approximately 15%" and that the melons could not be graded as "US No. 1 only [on] account [of] discoloration and decay."

[5] The jury found in effect that respondent had made out a so-called "prima facie" case by finding in substance that the melons were in good condition at the time the Bill of Lading was signed, but in damaged condition upon arrival (Answers to Special Issues Nos. 1 and 2, R. 176).

portation services as provided by the terms and conditions of the bill of lading and as instructed by the plaintiff and in a reasonably prudent manner as to matters not covered by the bill of lading or plaintiff's instructions" (Ans. to Special Issue No. 3, R. 177). The burden of proof as to this matter had been placed on the carrier. Although the case involved perishables which had decayed, the trial court nevertheless submitted to the jury as a separate issue the question whether the worsened condition of the melons upon arrival "was due solely to an inherent vice . . . existing at the time the melons were received by the carrier at Rio Grande City, Texas, for transportation" (Special Issue No. 6, R. 178). The jury answered this question in the negative.[6]

On the basis of the special findings, the trial judge entered judgment for damages against petitioner (R. 199). This ruling was affirmed on appeal by the Texas Court of Civil Appeals (R. 227, 235).

After granting a writ of error, the Texas Supreme Court affirmed the judgment. The Court ruled that where a claim is made for spoilage and decay of perishables "the carrier may not exonerate itself by showing that all transportation services were performed without negligence but must go further and establish that the loss or damage was caused by one of the four excepted perils recognized at common law" (R. 237).

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[6] Under Texas law and practice, the failure of a jury to find the affirmative of a special issue submitted to it does not constitute an affirmative finding to the contrary. See *Morris* v. *Texas & N.O.R.R.*, 269 S.W. 2d 565, 569, 572 (Tex. Civ. App. 1954); *Gulf States Utilities Co.* v. *Grubbs*, 44 S.W. 2d 1001, 1002 (Tex. Civ. App. 1932); 41B Texas Jurisprudence (1953), p. 780. See note 15, *infra*.

The Court below acknowledged that a number of courts have held that a carrier is not liable for spoilage of perishables unless it is negligent (R. 239). The Court below refused, however, to follow these authorities. It declined to recognize any special principle applicable to perishable goods, and it held that a carrier is absolutely responsible for the spoilage of perishables although "'all transportation services were performed without negligence" (R. 237). The Court also held that despite the fact that the case was unquestionably one of the spoilage of perishable commodities, and was one where the carrier had shown its freedom from fault, the case was not one which came under the exception in the Bill of Lading for losses due to a "vice in the property." (R. 243).

SUMMARY OF ARGUMENT

The basic point on which this case turns is that a common carrier of an interstate shipment of perishable commodities is not liable for damage in the form of spoilage and decay where the carrier has exercised due and reasonable care as to the shipment and has complied with the shipper's instructions. Here a jury expressly found that petitioner had borne the burden of showing that it had exercised reasonable care to prevent spoilage and that it had complied with the shipper's instructions. Accordingly, the carrier is absolved from liability in these circumstances (i) by the federal common law under the Interstate Commerce Act, (ii) by the express terms of the Bill of Lading, and (iii) by the relevant tariff provisions.

1. Under the federal common law, as applied under the Interstate Commerce Act, the carrier's responsibility as to goods being carried does not extend to

losses connected with the nature of the goods themselves. Thus a carrier is not liable for damage occasioned by the inherent nature of the goods, in the absence of negligence on the carrier's part.

This general principle has various specific applications. One application is to the case of loss arising from injury to livestock in transit. Another application uniformly made in the lower federal courts embraces the matter at bar—the case of loss or damage in the nature of spoilage or decay of perishable fruits and vegetables. With the exception of the case at bar, the modern cases uniformly hold that a common carrier is not liable for the spoilage and decay of perishable fruits and vegetables, absent negligence on the part of the carrier. As recently expressed by the Court of Appeals for the Fifth Circuit: "A common carrier is not absolutely liable for spoilage or physical deterioration during the course of shipment. So long as the carrier has discharged its duty of reasonable care, it is not liable for 'damage to a shipment caused . . . by the operation of natural laws upon it . . .' " *Trautmann Bros. Co.* v. *Missouri Pac. R.R.*, 312 F. 2d 102, 104 (5th Cir. 1962).

This rule makes a fair allocation of responsibilities. The shipper may readily establish a prima facie case, and then the carrier must come forward and affirmatively show its freedom from negligence and its compliance with the shipper's instructions, as was done here. The contrary rule would unfairly make a carrier a guarantor that perishable goods will not decay in transit.

2. The express terms of the Bill of Lading—the shipping contract—provides that, absent negligence,

the carrier is not accountable for loss or damage "resulting from a defect or vice in the property." This provision, properly construed, embraces the natural tendency of perishable fruits and vegetables to become overripe, spoil and decay. There was no need for the carrier to show that there was some peculiar unfitness present in the melons in question. The implication in the opinions of courts below that this was necessary is unique and incorrect, flying in the face of the settled law on the point.

3. The parties agreed in the Bill that the shipment was subject to the appropriate tariffs. The Perishable Protective Tariff, applicable to the shipment in question, likewise confirms that the carrier is not liable for the spoilage and decay of the melons, where the carrier has performed its duties without negligence, and in accordance with the shipper's instructions. The Federal cases unbrokenly support this interpretation.

The tariff makes it clear that a carrier moving perishable commodities and furnishing protective services for them, as was the case here, "does not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, but merely to retard such deterioration or decay insofar as may be accomplished by reasonable protective services . . . performed without negligence." Whether the tariff be viewed as itself setting the standard of liability, or simply reflecting the common law rule, it is evident here that as to the spoilage and decay claim of the shipper, the carrier was not liable, inasmuch as it bore the burden of showing its compliance with the shipper's instructions and its freedom from negligence.

ARGUMENT

The basic, single proposition upon which this case turns is this: A common carrier is not liable for spoilage and decay of an interstate shipment of perishable commodities when it bears the burden of showing that it has exercised reasonable care as to the shipment and has complied with the instructions of the shipper.

The jury in the present case specifically found in response to special interrogatories that petitioner was not negligent and that it had faithfully followed the shipper's instructions (Answer to Special Issue No. 3, R. 177). As we shall discuss, this finding constitutes a complete defense to a claim based upon spoilage and decay of perishable commodities. The carrier is absolved in these circumstances (i) by the federal common law,[1] as applied under the Interstate Commerce Act, (ii) by the understanding of the parties, as reflected in the Bill of Lading, and (iii) under the provisions of a special tariff applicable to perishable commodities.

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[1] The Court below recognized that "the liability of a carrier for damage to an interstate shipment is a matter of Federal law to be determined by the Federal statutes and decisions." (R. 239). "The rights and liabilities of the parties are governed by the acts of Congress, the bill of lading, and the tariffs duly filed with the Interstate Commerce Commission. The bill of lading and the tariff have the force of a statute." *Pennsylvania R.R.* v. *Greene*, 173 F. Supp. 657, 659 (S.D. Ala. 1959). See also *Galveston Wharf Co.* v. *Galveston, H. & S. A. Ry.*, 285 U.S. 127, 134-35 (1932); *Chesapeake & O. Ry.* v. *Martin*, 283 U.S. 209, 212-13 (1931); *Southern Ry.* v. *Prescott*, 240 U.S. 632, 636 (1916).

A. The Carrier Is Not Liable for Spoilage of Perishables Under the Federal Common Law as Applied Under the Interstate Commerce Act

1. The Bill of Lading under which the melons were shipped recites that "The carrier . . . shall be liable as at common law for any loss . . . or damage . . . except as hereinafter provided." (Section 1(a), R. 158).

The earliest common law cases spoke of a common carrier's liability in broad, undifferentiated terms. In the early 18th Century, Chief Justice Holt was able to say that a common carrier was answerable for any loss or damage to goods entrusted to its care, except for "acts of God, and of the enemies of the King." *Coggs* v. *Bernard,* 2 Ld. Raym. 909, 92 Eng. Rep. 107, 112 (Q.B. 1707).[8] However, as the common law developed, three additional exceptions to the carrier's liability were soon recognized: (i) the inherent vice or nature of the commodity; (ii) the fault of the consignor or owner of the goods; and (iii) an act by governmental authority. *Secretary of Agriculture* v. *United States,* 350 U.S. 162, 165, n. 9 (1956); Carver, *Carriage of Goods by Sea* (10th ed. 1957), p. 14.

By the early years of the 20th Century, the common law had developed a fundamental allocation of responsi-

[8] The justification given by Chief Justice Holt for this extreme rule was simply that otherwise "carriers might have an opportunity of undoing all persons that had any dealing with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered." 92 Eng. Rep., at 112. Loss from theft or mysterious disappearance in transit is, of course, under the fundamental allocation of responsibilities imposed by the modern common law (which we discuss below, pp. 11-14), still a matter for which the carrier is absolutely liable.

bility. The carrier's responsibility did not extend to matters connected with the nature of the goods themselves. Although as to certain matters connected with the transportation services the carrier was absolutely liable, "the common law did not impose a liability unrelated to the carrier's conduct." *Secretary of Agriculture* v. *United States, supra,* at 173 (concurring opinion). Accordingly, under the common law, "a carrier was not liable for damage occasioned by the inherent vice or nature of the goods in the absence of negligence." *United States* v. *Reading Co.*, 289 F. 2d 7, 9 (3d Cir. 1961).

2. This basic allocation of responsibility established at common law was codified by Section 20(11) of the Interstate Commerce Act, which provides that the carrier shall be liable "for any loss . . . to such property caused by it . . . ." *Secretary of Agriculture* v. *United States, supra,* at 165, n. 9. In construing this provision, this Court said in *Adams Express Co.* v. *Croninger*, 226 U.S. 491, 506 (1913): "The suggestion that an absolute liability exists for every loss, damage, or injury, from any and every cause, would be to make such a carrier an absolute insurer and liable for unavoidable loss or damage, though due to uncontrollable forces. That this was the intent of Congress is not conceivable. To give such emphasis to the words 'any loss or damage,' would be to ignore the qualifying words, 'caused by it.'"

This fundamental division of responsibility—expressed in a leading English case as "the carrier answers for his ship and men, the cargo-owner for his cargo," *F. O. Bradley & Sons Ltd.* v. *Federal Steam Navigation Co. Ltd.*, 137 Law Times Rep. 266 (H.L.

1927)[9]—has been applied in various contexts. One such application is the principle—acknowledged by the Court below (R. 243)—that in the case of loss arising from injury to livestock in transit, the carrier discharges his responsibility when it shows that it has performed the transportation services without negligence. As a leading case puts it, it is generally recognized that "due to the peculiar nature and propensity of animals, the carrier should not be liable for injury thereto, if it ha[s] provided suitable means of transportation and exercised the degree of care which the nature of the property require[s] . . . [Animals] may be injured, or even killed, by acts arising out of their own inherent nature and unaccompanied by any human agency or negligence." *Southern Pac. Co.* v. *Itule*, 51 Ariz. 25, 30-31, 74 P. 2d 38, 40-41 (1937). See *Hafer* v. *St. Louis S.W. Ry.*, 101 Ark. 310, 142 S.W. 176 (1911).

3. Likewise, the large-scale development, in relatively recent years, of long distance transportation of fresh fruits and vegetables in interstate commerce has led to the evolution of an appropriate rule governing the carrier's liability as to the spoilage and decay of such property. This rule is based on the same underlying fundamental allocation of responsibility as the so-called "livestock rule". The principle that the carrier should not be accountable for "unavoidable loss or damage" arising from the "inherent nature" of the commodity transported has been the basis of decisions by numerous courts absolving the carrier of liability for spoilage and decay to perishables upon proof that

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[9] The *F. O. Bradley & Sons* opinion is reprinted in the Petition for Certiorari, Appendix p. 38a.

the carrier has exercised reasonable care, and has handled the goods in the manner requested by the shipper. *Trautmann Bros. Co.* v. *Missouri Pac. R.R.*, 312 F. 2d 102 (5th Cir. 1962); *Larry's Sandwiches, Inc.* v. *Pacific Elec. Ry.*, 318 F. 2d 690 (9th Cir. 1963); *Sutton* v. *Minneapolis & St. L. Ry.*, 222 Minn. 233, 23 N.W. 2d 561 (1946); *Howe* v. *Great No. Ry.*, 176 Minn. 46, 222 N.W. 290 (1928); *Missouri Pac. R.R.* v. *H. Rouw Co.*, 202 Ark. 1139, 155 S.W. 2d 693 (1941); *Railway Express Agency, Inc.*, v. *H. Rouw Co.*, 197 Ark. 1142, 127 S.W. 2d 251 (1939); *Southern Pac. Co.* v. *Itule*, 51 Ariz. 25, 74 P. 2d 38 (1937); *W. E. Roche Fruit Co.* v. *Northern Pac. Ry.*, 184 Wash. 695, 52 P. 2d 325 (1935); *Cassone* v. *New York, N.H. & H. R.R.*, 100 Conn. 262, 123 Atl. 280 (1924); *Daniels* v. *Northern Pac. Ry.*, 88 Ore. 421, 171 Pac. 1178 (1918); *Farris Bros. & Co.* v. *Pennsylvania R.R.*, 98 Pa. Superior Ct. 123 (1930); *Austin* v. *Seaboard Air Line R.R.*, 188 F. 2d 239 (5th Cir. 1951). See also *Watson Bros. Transp. Co.* v. *Feinberg Kosher Sausage Co.*, 193 F. 2d 283, 285 (8th Cir. 1951); *Delphi Frosted Foods Corp.* v. *Illinois Cent. R.R.*, 188 F. 2d 343, 346 (6th Cir.), *cert. denied*, 342 U.S. 833 (1951); *Hamilton Foods, Inc.* v. *Atchison, Topeka & S.F. Ry.*, 83 F. Supp. 478, 479 (S.D. Cal. 1948), *aff'd*, 173 F. 2d 573 (9th Cir. 1949), *cert. denied*, 337 U.S. 917 (1949); *Frye* v. *Railway Express Agency, Inc.*, 41 Tenn. App. 429, 296 S.W. 2d 362 (1955); *Railway Express Agency, Inc.* v. *Shull*, 224 Ark. 476, 275 S.W. 2d 882 (1955); *Chesapeake & O. Ry.* v. *Gilbert*, 83 A. 2d 327 (D.C. Munic. Ct. App. 1951); *Watson Bros. Transp. Co.* v. *Domenico*, 118 Colo. 133, 194 P. 2d 323 (1948); *Sugar* v. *National Transit Corp.*, 82 Ohio App. 439, 443, 81 N.E. 2d 609, 611 (1948); *Illinois Cent. R.R.* v. *H. Rouw Co.*, 25 Tenn.

App. 475, 159 S.W. 2d 839 (1940); *Texas & Pac. Ry.* v. *Empacadora de Cuidad Juarez,* 309 S.W. 2d 926 (Tex. Civ. App. 1957).

4. This has been the rule uniformly applied in the lower Federal Courts under the federal common law prevailing under the Carmack Amendment. As the Court of Appeals for the Ninth Circuit stated recently, in *Larry's Sandwiches, Inc.* v. *Pacific Elec. Ry., supra,* at 692: "Upon proof of the perishable nature of the goods the carrier is relieved of its insurer's liability"—and the test is negligence.

The Court of Appeals for the Fifth Circuit—in a statement which the Court below declined to follow—recently phrased the rule applicable to cases of the spoilage and decay of perishables in these words: "A common carrier is not absolutely liable for spoilage or physical deterioration during the course of shipment. So long as the carrier has discharged its duty of reasonable care, it is not liable for 'damage to a shipment caused by the operation of natural laws upon it . . .'" *Trautmann Bros. Co.* v. *Missouri Pac. R.R., supra,* at 104. See also *Austin* v. *Seaboard Air Line R.R.,* 188 F. 2d 238 (5th Cir. 1951).

And in a leading and frequently cited case, which the Court below also expressly declined to follow, the Arizona Supreme Court expressed the rationale underlying this rule as follows: "It is a notorious fact, of which the courts may well take judicial notice, that all fruits and vegetables of every nature will ultimately decay, although no human agency has approached them after their maturity. The possibility of damages to this class of goods in shipment, without any negligence on the part of the carrier, is, in our opinion, even

greater than that of damage to livestock . . ." *Southern Pac. Co.* v. *Itule, supra,* 51 Ariz., at 33, 74 P. 2d, at 41.[10]

5. This rule—uniformly followed in the lower federal courts, and never dissented from in the modern decisions, apart from the holding of the courts below,[11] as far as our research indicates—represents a reasonable and equitable allocation of responsibility between shippers and carriers for loss in the form of spoilage and decay. It is a rule restricted to matters, such as spoilage and decay, connected with the nature of the goods themselves. In the case of loss not arising out of the nature of the goods—such as for example, injury

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[10] The Texas Supreme Court below accepted the "livestock rule", but (contrary to the passage quoted from the *Itule* case) stated that the "so-called livestock rule is based, at least in part, upon considerations which have no application in the case of inanimate perishables." (R. 243.) The Court quite accurately observed: "We know that honeydew melons do not have the propensities of Brahma cattle, and are not likely to bite each other or kick the slats out of crates." *(Ibid.)*—On the other hand, it can just as fairly be said that Brahma cattle do not become overripe as rapidly as honeydew melons.—The whole point, which the Texas Supreme Court did not apprehend, is that the common law rules both as to livestock and as to perishable vegetables and fruits are simply applications of the fundamental principle that the carrier's responsibility does not extend to matters connected with the nature of the goods themselves; regardless of whether this happens to be the tendency of livestock to kick one another or the tendency of melons to rot.

[11] The Texas Supreme Court did not refer to any case in which a carrier was held liable for spoilage to perishables notwithstanding a finding of due care and compliance with the shipper's instructions. The cases cited by the Court below either did not involve perishable commodities, *e.g., Compania de Vapores Insco* v. *Missouri Pac. R.R.,* 232 F. 2d 657 (5th Cir.), *cert. denied,* 352 U.S. 850 (1956) (automobiles); *Reider* v. *Thompson,* 116 F. Supp. 279 (E.D. La. 1953) (sheepskins), or were cases where the carrier was found to have been negligent. *E.g., Schnell* v. *The Vallescura,* 293 U.S. 296, 306 (1934).

accompanied by breaking of the crates in which vegetables or fruits are shipped—the rule remains that the carrier cannot escape liability by proving its freedom from fault. See *Yeckes-Eichenbaum, Inc.* v. *Texas Mexican Ry.*, 263 F. 2d 791, 794 (5th Cir.), *cert. denied*, 361 U.S. 827 (1959).[13]

In the administration of the rule consistently applied in the lower federal courts concerning loss through spoilage or decay, the shipper has every possible reasonable protection. The shipper can establish a prima facie case of liability, as he did here, simply by showing that the fruit was in good condition at the time of shipment but spoiled upon arrival. Then the burden is upon the carrier to establish that it exercised reasonable precautions to prevent spoilage and had meticulously carried out the shipper's directives. The jury here found that petitioner had made such a showing and had met this burden.

In the case of a claim for spoilage or decay of perishable commodities, we submit that in view of the uniform holdings of the federal courts, based on the common law principles we have set out, this showing is sufficient to establish a defense; and that the rule on which it is based affords the shipper of perishable commodities every protection which the common law gives him. The contrary rule would unfairly make the carrier a guarantor of the condition of commodities by their nature highly perishable, and as to whose properties and preservation requirements the shipper has superior knowledge.

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[13] The Texas Supreme Court expressed surprise at the suggestion that different principles were applicable in the case of breakage of crates as distinguished from spoilage of perishables (R. 242). But this distinction between breakage and spoilage cases is one which is clearly made in the Federal common law, as Judge Hutcheson's opinion in the *Yeckes-Eichenbaum* case, cited in the text, clearly demonstrates.

B. The Bill of Lading Exempts the Carrier, Absent Negligence, for Loss Arising from the Inherent Vice or Nature of the Goods

Not only does the liability of the carrier "at common law" not extend to the spoilage of perishables caused without its fault, but the Bill of Lading recognizes this by providing, in terms, that absent negligence the carrier shall not be accountable for loss or damage "resulting from a defect or vice in the property." (Section 1(b), R. 158). A bill of lading is, of course, "a contract, binding as other contracts upon the parties thereto." *Pennsylvania R.R.* v. *Greene*, 173 F. Supp. 657, 659 (S.D. Ala. 1959). Accordingly, the contractual understanding of the parties, as reflected by the Bill, was that "the duty imposed on a carrier in handling perishables is to exercise reasonable care," and the carrier is "not liable for damage occasioned by the inherent vice or nature of the goods in the absence of negligence." *United States* v. *Reading Co.*, 289 F. 2d 7, 9 (3d Cir. 1961).

The Court below apparently labored under a misapprehension of the meaning of this clause in the Bill. It declined to view damage in the nature of spoilage or decay of perishables as a loss arising from the "inherent vice or nature of the goods," absent some form of showing by the carrier that this specific shipment of perishable goods was particularly or peculiarly unfit for the journey. This novel view is contrary to the federal law on the matter.[13]

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[13] *Trautmann Bros. Co.* v. *Missouri Pac. R.R.*, *supra*, precisely illustrates this. There some evidence had been submitted to the effect that melons grown at Laredo, the place of origination of the shipment involved there, were peculiarly prone to decay. This was contested on appeal, but the Fifth Circuit held the matter irrele-

The established meaning of the clause is that when damage to perishable goods arises through spoilage or decay a case of "damage occasioned by the inherent vice or nature of the goods" is presented, and the carrier may exonerate itself by showing its freedom from fault, as petitioner did here. *United States* v. *Reading Co., supra; Trautmann Bros. Co.* v. *Missouri Pac. R.R., supra; Delphi Frosted Foods Corp.* v. *Illinois Cent. R.R.*, 89 F. Supp. 55, 58-59 (W.D. Ky. 1950), *aff'd*, 188 F. 2d 343 (6th Cir. 1951), *cert. denied*, 342 U.S. 833 (1951); *Atlantic Coast Line R.R.* v. *Georgia Packing Co.*, 164 F. 2d 1 (5th Cir. 1947). No showing of peculiar or unusual spoilage tendencies in the perishable commodities is demanded. As the Court of Appeals for the Ninth Circuit put it in its recent decision in *Larry's Sandwiches, Inc.* v. *Pacific Elec. R.R., supra*, 318 F. 2d, at 692-93, in the case of spoilage and decay to "perishable goods, the burden upon the carrier is not to prove that the damage resulted from the inherent vice of the goods, but to prove its own compliance with the rules of the tariff and the shipper's instructions."

The established construction of the clause is illuminated by the opinion of the House of Lords in *F. O. Bradley & Sons Ltd.* v. *Federal Steam Navigation Co. Ltd.*, 137 Law Times Rep. 266 (1927), construing a provision of the Australian Sea-Carriage of Goods

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vant: "Even if it is true, as appellant contends, that the district court's finding of inherent vice was based upon improper inferences from general conditions at Laredo, the evidence is nevertheless ample to support the judge's additional finding that the *defendant was not negligent* and hence did not contribute to the spoilage." (312 F. 2d, at 105) (Emphasis supplied). In short, once the case is one of spoilage or decay, the question is not whether the spoilage was expectable in some unusual way, but simply whether the carrier's negligence contributed to it.

Act,[14] similar to the provision contained in the Bill involved here. There, the House of Lords affirmed a judgment in favor of the carrier in a suit for damages for the spoilage of a cargo of apples shipped from Australia to London. It had been found that "there had been no want of care" by the carrier. The House of Lords rejected the contention that to avail itself of the "inherent vice" exception, the carrier must "put a name to the vice or specify some particular inherent quality and distinguish it from all others." 137 Law Times Rep., at 270. The Court also dismissed the argument that "inherent vice is a term indicative of some abnormal defect or disease, and that the normal fact that apples are but mortal is not sufficient . . . ." *Id.*, at 271. As the Court put it, it was enough that the apples "decayed not because of the ship or of the route, but because they were apples . . . This is the kind of risk which the Act does not call on the [carrier] to bear, for he has really nothing to do with it . . ." *Ibid.* Accordingly, the Court concluded that the case was within the "inherent vice" clause.

In fact, it has been common ground, even conceded in the published positions of the representatives of the interests of agricultural shippers, that damage in the nature of spoilage or decay of perishable goods falls within the "inherent vice" exception, and that accordingly as to such spoilage the carrier may obtain exoneration by showing its freedom from fault. See the position of the Secretary of Agriculture, "as representative of the Agricultural Community in the United

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[14] "[N]either the ship nor her owner . . . shall be responsible for damage to . . . the goods resulting from . . . the inherent defect, quality, or vice of the goods." § 8(2), Australian Sea-Carriage of Goods Act, Statute No. 14 of 1904.

States", noted in *Secretary of Agriculture* v. *United States, supra,* at 165, n. 9. (Brief, pp. 12-13, for the Secretary in that case.)

It has never before been intimated that the exception embraces only spoilage or decay of some extraordinary or unusual nature. The Bill certainly does not support such a construction. It was, therefore, inconsistent with established principles and erroneous for the courts below to proceed on the basis that the exception for damages "resulting from a defect or vice in the property" did not altogether embrace the decay or spoilage of perishable goods not contributed to by any fault on the part of the carrier.[18]

C. The Carrier Is Not Liable for Damage in the Form of Spoilage Under the Provisions of the Perishable Protective Tariff Applicable to the Shipment Here

The conclusion that the carrier is not liable in the circumstances presented by the record here is con-

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[18] Accordingly, inasmuch as it was undisputed that the damage to the goods was in the form of spoilage and decay, the court below should not have submitted to the jury as a separate issue the question whether the worsened condition of the melons upon arrival "was due solely to an inherent vice." (R. 178.) But in any event, the jury's "no" answer is immaterial. Under Texas law and practice, the failure of a jury to find the affirmative of the special issue submitted to it does not constitute an affirmative finding to the contrary. See the authorities collected in note 6, *supra.* Accordingly, the "no" answer of the jury did not constitute a finding that the damage to the melons did *not* result solely from inherent vice. The undisputed facts that a perishable commodity was involved and that the loss took the form of spoilage and decay, and the affirmative finding that the carrier had complied with the shipper's instructions, and was free from negligence, are sufficient to bring the case as a matter of law within the "inherent vice" exception, when that exception is properly construed, and not limited in the fashion in which it was viewed by the courts below. The courts below did not indicate that there was any conflict between the findings under the Texas law; and, as indicated, there is none.

firmed by the provisions of a special tariff applicable to the shipment of perishables.

Rule 130 of Perishable Protective Tariff No. 17 (Appendix, p. 25, *infra*), which applied to the shipment in the present case,[16] provides in relevant part that "carriers furnishing protective service as provided herein do not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, but merely to retard such deterioration or decay insofar as may be accomplished by reasonable protective service . . . performed without negligence." It has been repeatedly held that this tariff prescribes the standard of liability in suits for spoilage and decay. See, *e.g.*, *Trautmann Bros. Co.* v. *Missouri Pac. R.R.*, *supra*, at 104; *Atlantic Coast Line R.R.* v. *Georgia Packing Co.*, 164 F. 2d 1, 4 (5th Cir. 1947); *Delphi Frosted Foods Corp.* v. *Illinois Cent. R.R.*, *supra*, 188 F. 2d, at 346; *Hamilton Foods, Inc.* v. *Atchison, T. & S.F. R.R.*, *supra*, 83 F. Supp., at 479; *Sutton* v. *Minneapolis & St. L. Ry.*, 222 Minn. 233, 236, 23 N.W. 2d 561, 562 (1946).

The Court of Appeals for the Ninth Circuit expressed the standard of liability under this tariff in *Larry's Sandwiches, Inc.* v. *Pacific Elec. Ry.*, *supra*, at 692-93, as follows:

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[16] The Bill of Lading (R. 157) recites that the goods were "Received, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading." The Perishable Protective Tariff was filed with the ICC pursuant to 49 U.S.C. § 6(1), and it is controlling. *Pennsylvania R.R.* v. *Greene*, 173 F. Supp. 657, 659 (S.D. Ala. 1959). See *Davis* v. *Cornwell*, 264 U.S. 560, 562 (1924).

> "Where perishable goods are involved the provisions of the Carmack amendment codifying the common law are given force through the Perishable Protective Tariff . . . Rules 130 and 135 of that tariff establish the tests of negligence.
>
> "Upon proof of the perishable nature of the goods the carrier is relieved of its insurer's liability, and its duty becomes one 'to furnish without negligence reasonable protective service of the kind and extent so directed or elected by the shipper . . .' (Rule 135.)
>
> "Thus, in the case of perishable goods the burden upon the carrier is not to prove that the damage resulted from the inherent vice of the goods, but to prove its own compliance with the rules of the tariff and the shipper's instructions . . ."

The history of the Interstate Commerce Commission's approval of this tariff is illuminating. It was originally proposed that carriers furnishing protective services be absolved of "any liability" for deterioration or decay. See *Perishable Freight Investigation*, 56 I.C.C. 449, 481 (1920). It was objected that under this formulation the carriers would not be answerable for damage even if negligent, and the rule was accordingly revised by the Commission itself to its present form under which "The duty of the carrier is to furnish without negligence reasonable protective service" (Rule 135, Appendix, p. 25, *infra*). The Court below in effect has revised the protective tariff so as to render the carrier liable for deterioration or decay even if it exercises reasonable care and adheres to the shipper's instructions.

The protective tariff would be unintelligible except against the background of a common law rule which exonerates the carrier from liability for damage in the form of spoilage and decay where it can prove its freedom from negligence and its compliance with the shipper's instructions. Otherwise, the state of the law would be that the carrier would be liable only for negligence in the case of spoilage of perishables if protective services were requested, but absolutely liable if they were not. We submit that this would be an absurd conclusion.

Moreover, the tariff recites that the carrier "furnishing protective service as provided herein does not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay . . ." Again, this provision would be unintelligible if the carrier, at common law, already had a duty to overcome this tendency. Thus, whether the tariff be viewed as prescribing the ultimate standard for decision in this case—a case undisputably of spoilage and decay, where protective services were requested and furnished,—or whether it is viewed simply as evidence of the common law rule, the conclusion is the same: The carrier is exonerated if it performs its obligations without negligence and in accord with the shipper's instructions.

Therefore, in the present case, the jury finding that the carrier had borne the burden of proof that it had performed its obligations without fault and in accord with the instructions of the shipper, absolved the carrier in the light of the protective tariff and required the entry of judgment for petitioner.

CONCLUSION

For the reasons stated, the judgment of the Texas Supreme Court should be reversed.

Respectfully submitted,

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APPENDIX

Rules 130 and 135 of Perishable Protective Tariff No. 17

"Rule 130—CONDITION OF PERISHABLE GOODS NOT GUARANTEED BY CARRIERS.—Carriers furnishing protective service as provided herein do not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, but merely to retard such deterioration or decay insofar as may be accomplished by reasonable protective service, of the kind and extent requested by the shipper, performed without negligence."

"Rule 135—LIABILITY OF CARRIERS.—Property accepted for shipment under the terms and conditions of this tariff will be received and transported subject to such directions, only, and to such election by the shipper respecting the character and incidents of the protective service as are provided for herein. The duty of the carrier is to furnish without negligence reasonable protective service of the kind and extent so directed or elected by the shipper and carriers are not liable for any loss or damage that may occur because of the acts of the shipper or because the directions of the shipper were incomplete, inadequate or ill-conceived."